Supreme Court, U.S.
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No. 93-1244

In The

Supreme Court of the United States

October Term, 1993

GEORGE FITZPATRICK and HEZA FITZPATRICK,

Petitioners,

vs.

JACK MACKEY and SGT. LEE MEYER,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

The Petitioners operated three group homes for the mentally retarded. They received their license to operate these homes from the State of Ohio. Inspection procedures and record keeping requirements were promulgated by the State. The State also retained the right to review any and all records maintained by the Petitioners. (G. Fitzpatrick Deposition at 18, 20).

Jack Mackey (Mackey) was the superintendent of the Brown County Board of Mental Retardation and Developmental Disabilities (MRDD). (J. Mackey Deposition at 5). The responsibility of MRDD with respect to group homes within the county was to monitor the delivery of services to mentally retarded clients through its case management service. The case manager was to visit the homes, make observations on the quality of services and in the event of abuse or neglect of a client to report the incident to the proper authority. The proper authority would be Mackey as Superintendent of the local Board, the Ohio Department of Mental Retardation and Developmental Disabilities and, in serious cases of abuse, the county Sheriff's Department. (J. Mackey Deposition at 6-7).

On November 9, 1990, Mackey received a report of a rape of a mentally retarded client at one of the Petitioners' homes, and, on the same date, called the State Department of Mental Retardation and Developmental Disabilities, the Sheriff's Department, the County Human Services Department and the Petitioner, George Fitzpatrick, concerning the report. (Mackey Deposition at 9-12).

Mackey immediately began to inquire into the incident by questioning the alleged victim and other residents of the group home and by having the alleged victim examined at a hospital. (J. Mackey Deposition at 12).

Mackey reported by phone to the Brown County Sheriff that a rape had been reported by a client, that the client was being examined at the hospital and he requested the assistance of the Sheriff in the investigation. (J. Mackey Deposition at 18-19). Mackey spoke by phone with Sgt. Lee Meyer (Meyer) of the Sheriff's Office and suggested to Meyer that the group home records should be frozen and that Meyer communicate that to Mr. Fitzpatrick. (J. Mackey Deposition at 19-20).

Mackey was aware that Meyer was going to the group home to question employees as part of his investigation of the alleged rape and Mackey suggested, "While you are out there you should probably tell him his records are frozen." (Mackey Deposition at 40). In Mackey's mind it was a request to the sheriff, he knew he could not direct the sheriff to do anything. (J. Mackey Deposition at 55).

In suggesting to Meyer that the records be frozen, it was Mackey's purpose that the group home records maintain their integrity, free of tampering so that in any subsequent investigation nothing would be in the records that would alter any of the facts on the reality of the situation. Mackey felt that this would be in everyone's best interest, including the Fitzpatricks'. (J. Mackey Deposition at 19-20 and 62). Mackey also suggested to Fitzpatrick in a phone conversation on November 9th that

Fitzpatrick initiate his own investigation. (J. Mackey Deposition at 21).

Meyer responded to the Fitzpatrick group home on the afternoon of November 9, 1990 to investigate the reported incident. (G. Fitzpatrick Deposition at 62, 66). Meyer took a statement from Mike Lyons, Fitzpatrick's son-in-law, who, at the time, had been identified in the criminal complaint. (G. Fitzpatrick Deposition at 11, 66). While at the group home, Meyer told Fitzpatrick that he [Meyer] had orders to freeze Fitzpatrick's records. (G. Fitzpatrick Deposition at 65).

As Meyer was leaving, Teresa Holbrook, a case worker with the Brown County Department of Human Services and Todd Cribett, a case manager with Brown County MRDD, arrived at the home and asked to see Fitzpatrick's records. Both Holbrook and Cribett were at the home for the purpose of conducting an investigation concerning the rape allegation and other allegations of neglect and abuse.

Pursuant to the case management responsibilities of the MRDD, Holbrook and Cribett reviewed Petitioners' records until approximately midnight, when a decision was made to remove two boxes of records from the premises. (G. Fitzpatrick Deposition at 79-81). The records reviewed and the records removed were all subject to inspection and review by MRDD and the Department of Human Services. (G. Fitzpatrick Deposition at 218-219).

Within approximately two days, the State Department of MRDD arrived at the home to review records and place monitors in all the Fitzpatrick homes on a round-

the-clock basis seven days a week. (G. Fitzpatrick Deposition at 91, 92). Fitzpatrick understood the State's involvement stemmed from the accusations of rape and abuse. (Fitzpatrick Deposition at 93). A portion of the records were returned to the Fitzpatricks within a few days of November 9 and another portion were returned on November 19th or 20th. (G. Fitzpatrick Deposition at 94, 95).

The United States District Court for the Southern District of Ohio, Western Division, denied in part Mackey's Motion for Summary Judgment finding that genuine issues of material fact existed regarding the issue of qualified immunity. The United States Court of Appeals for the Sixth Circuit reversed, concluding that the lower court erred in finding that Petitioners' Fourth Amendment rights were violated when Meyer told them to consider their business records frozen. The Court observed that there was no authority holding that conveying a message that one's business records should be "frozen" is an act constituting a "seizure" under the Fourth Amendment.

Because the Court concluded that Meyer did not violate Petitioners' rights when he delivered Mackey's message to the Fitzpatricks, it followed that Mackey was also entitled to qualified immunity.

SUMMARY OF ARGUMENT

Petitioners seek review by this Honorable Court, via a Writ of Certiorari, of the holding by the Sixth Circuit

that Respondent Mackey is entitled to qualified immunity.

Petitioners, in order to establish the existence of a clearly established right violated by Mackey, seek to have the Court define and refine the standards regarding the unreasonable seizure of property so that this Respondent is found to have violated the standard. Only by way of such an ex post facto legal development can the right become clearly established. However, the prior decisions of this Court require that the right be clearly established at the time of the alleged violation not at some later point in time as a result of subsequent legal developments.

ARGUMENT

> Because there exists no authority holding that the conveying to another of a message that their records are frozen is an act which constitutes a seizure under the Fourth Amendment, Petitioners have failed to identify a clearly established right alleged to have been violated and therefore this Respondent is entitled to qualified immunity.

This Court, in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982) defined the parameters of qualified immunity:

> We therefore hold that government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.

> Reliance on the objective reasonableness of an official's conduct, as measured by reference to clearly established law, should avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment. On summary judgment, the judge appropriately may determine, not only the currently applicable law, but whether that law was clearly established at the time an action occurred. If the law at that time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to "know" that the law forbade conduct not previously identified as unlawful. Until this threshold immunity question is resolved, discovery should not be allowed. If the law was clearly established, the immunity defense ordinarily should fail, since a reasonably competent public official should know the law governing his conduct.

Id. at 818-819. (citations and footnotes omitted).

In *Anderson v. Creighton*, 483 U.S. 635 (1987), this Court provided guidance as to the meaning of "clearly established law". The *Anderson* court recognized that if "clearly established law" is applied in a general sense, it then bears no relationship to the "objective legal reasonableness" which, in part, determines an officer's entitlement to qualified immunity. Rather, the Court explained the concept of "clearly established" as:

> The contours of the right must be sufficiently clear that a reasonable officer would understand that what he is doing violated that right. This is not to say that an official action is protected by qualified immunity unless the very action in

> question has previously been held unlawful, but it is to say that in the light of pre-existing law, the unlawfulness must be apparent. *Id.* at 640. (citations omitted)

Accordingly, to determine whether a defendant is protected by qualified immunity, the Court must determine first whether petitioners have identified a clearly established right alleged to have been violated, whether the decisions of this Court on search and seizure provide an authoritative, "clearly established" rule which would have forewarned the Respondents Meyer and Mackey that their conduct was in violation of that right. Where an official's duties legitimately require action in which clearly established rights are not implicated, the public interest is better served by action taken with independence and without fear of consequences. *Harlow*, supra at 819.

The Sixth Circuit properly concluded that since there existed no authority establishing that the conveying of a message that one's business records are "frozen" constitutes a "seizure" there existed no clearly established right. Since the law was not clearly established the Respondents could not "know" that the law forbade their conduct.

The Petitioners implicitly recognize the absence of a clearly established right. They argue that a ruling by this Court that the freezing of records constituted a Fourth Amendment violation would "dispel a dark cloud of uncertainty", Petition at 11. If the situation is such how can it be argued that the right is clearly established?

Petitioners contend that this case presents "an appropriate avenue for this Court to define and refine the standards of unreasonable seizure of property in violation of the Fourth Amendment". Petition at 20. In this way, it is argued, lower tribunals will receive needed guidance in determining whether to condemn the actions of government officials. If the standards of unreasonable seizure of property need further definition and refinement and if lower courts are in need of guidance then obviously the law is not clearly established. If definition and refinement are necessary, this case is not the proper vehicle. The issue here is whether Petitioners identified a clearly established right alleged to have been violated not whether the right needs further explication.

Petitioners have failed to demonstrate the existence of any of the considerations governing review on writ of certiorari and have failed to demonstrate any special or important reasons therefore.

CONCLUSION

The petition for a writ of certiorari must therefore be denied as Petitioners have presented no issue for review by this Court nor the existence of a constitutional issue.

Respectfully submitted;

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